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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 64.

UNITED STATES OF AMERICA,
Appellant,

v.

JAMES GRIGGS RAINES et al.,
Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

BRIEF FOR APPELLEES.

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Appeal from the United States District Court for the Middle District of Georgia.

BRIEF FOR APPELLEES.

QUESTIONS PRESENTED.

In the notice of appeal filed by the United States April 23, 1959, the following questions were stated as being presented:

1. Whether 42 U. S. C. 1971 (a) and (c) . . . Part IV of the Civil Rights Act of 1957 . . . providing for the institution of civil actions for preventive relief by the Attorney General for or on behalf of the United States is constitutional.

2. Whether 42 U. S. C. 1971 (a) and (c) . . . Part IV of the Civil Rights Act of 1957 . . . must be construed to authorize the institution of civil actions by the Attorney

General against private persons not acting under color of state law (R. 42).

In the Jurisdictional Statement filed in the Supreme Court in May of 1959 (pp. 3 and 4) under the subhead, "Question Presented", is this statement: ". . . the question is whether subsections (a) and (c) are unconstitutional *in toto* because, as construed by the District Court but not by the government or by any other court, they may permit the Attorney General to seek injunctive relief "against a private citizen for an individual act, divorced completely from state action".

In the brief for the United States filed in this Court in September of 1959 (p. 4), under the subhead "Question Presented" is this statement: "Whether the District Court erred in construing subsections (a) and (c) of 42 U. S. C. 1971 to authorize injunctive suits by the Attorney General with respect to private action depriving citizens of the right to vote, and in holding that, as so construed, the subsections were unconstitutional *in toto,* in a case in which the only action involved was state, not private, action." (In the Government's brief filed in the District Court [p. 2], it is said: ". . . the present action is not one against the State of Georgia but merely against certain individuals acting unlawfully" [Emphasis added]).

Before presenting and arguing what we deem to be the question decided by the District Court in dismissing the complaint, and the questions presented by the cross-appeal (R. 43), we pose this question:

Does the Supreme Court have jurisdiction of this appeal?

We respectfully suggest that, despite the provisions of 28 U. S. C. 1252, this Court does not have jurisdiction because the appellant has injected into the case a question other than that of whether an Act of Congress is

constitutional. In the appeal there is presented a question of **construction** of the Act of Congress. In the notice of appeal (R. 42), two questions were presented. The second of those was whether (the statute) must be construed to authorize the institution of civil actions by the Attorney General against private persons not acting under color of state law.

We respectfully submit that the inclusion by the United States of that question in their appeal deprives this Court of its jurisdiction under 28 U. S. C. 1252.

Evidently counsel for the United States have some doubt as to the jurisdiction of this Court. That doubt is evidenced in their brief (pages 6-7, 10-16). At page 16, counsel say: "That holding created the occasion **and necessity** for a direct appeal to this Court" (Emphasis supplied). Section 28 U. S. C. 1252 confers a privilege, not an obligation, on the United States.

Was the judgment of the District Court dismissing the complaint (R. 41) **correct?**

In arguing that question, we emphatically reject the contention of counsel for the appellant in their third effort to pose the question presented (Their brief, page 4). This is **not** "a case in which the only action involved was state, not private action."

It is charged in the complaint that the appellees "while discharging the duties of the offices aforesaid were acting under color of law of the State of Georgia."

But acts proscribed by the Fifteenth Amendment are not acts of individuals even though such acts are performed at a time when those individuals are state officers.

The first section of the Fifteenth Amendment is: "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any

State on account of race, color, or previous condition of servitude."

The complaint in this case does not allege any abridgement or denial of rights of citizens to vote by the United States or by any State. Specifically, the complaint does not allege any such denial or abridgement by the State of Georgia. The complaint does not allege "a case in which the only action involved was State, not private, action."

If the appellees had been guilty of the acts and practices alleged in the complaint, they would have been guilty of a violation of the laws of Georgia; they would have been acting contrary to the laws of Georgia.

While, belatedly, counsel claim now that the only action involved was state action, the complaint which they filed shows that the alleged acts and practices were those of the individual defendants.

Allegedly, they include "arbitrary and discriminatory delay in handling applications of Negroes for registration; the arbitrary refusal to register Negroes . . .; and the discriminatory application of more difficult and more stringent registration standards to Negro applicants from those applied to white applicants" (R. 3-4, complaint paragraph 9).

Then follows (R. 4) this language: "Said acts and practices were and are further designed and intended **by defendants** to perpetuate the disparity referred to . . ." An abridgement or denial by the State of Georgia? Acts and practices designed and intended by the State of Georgia to perpetuate disparity between the voters of the different races? No. The alleged acts and practices were designed and intended by the defendants. That none of the alleged acts and practices were those of the State, but that all of the alleged acts were those of the defendants,

if true, is further demonstrated by the averments of paragraph 14 of the complaint (R. 6). It is there alleged that certain Negro citizens were "**arbitrarily and without legal cause . . . prevented by said defendants** from demonstrating to write correctly and legibly . . ." (Emphasis added).

That averment is repeated in paragraph 16 of the complaint (R. 7).

And in paragraph 17 of the complaint it is categorically alleged:

> "**Defendants** in the administration of the literacy test provided by the Georgia Constitution, **have applied** different and more stringent registration standards to Negro applicants from those they applied to white applicants" (R. 7). (Emphasis added).

Then follows paragraph 18 of the complaint:

> "The application of different standards by defendants as aforesaid was not accidental but was **designed and intended by them** to discriminate against Negro applicants on account of their race or color" (R. 7) (Emphasis added).

If the allegations of the complaint are true they make this case: The State of Georgia has enacted constitutional and statutory provisions regulating the right to register and vote. The State of Georgia has discriminated against no one mentioned in the complaint. In the administration of the tests provided by law, the defendants who are registrars have not complied with the laws of the State of Georgia, but have arbitrarily and without legal cause prevented certain individuals from complying with the standards fixed by the law of Georgia. The defendants who are registrars have designedly and intentionally applied different and more stringent standards to Negroes

from those applied to whites. They have done those things arbitrarily and without legal cause.

Even if those allegations were true, where would there be any denial or abridgement by the State of Georgia? Where would there be any denial or abridgement by the State of Georgia? Where would there be any action of the State of Georgia? All of the alleged actions were not only those of the State of Georgia, but, if true, directly contrary to the laws of Georgia.

Congress under Section 2 of the Fifteenth Amendment, has power to enforce the amendment by appropriate legislation. Appropriate legislation is confined to the express subject matter of the amendment, to wit: Neither the United States nor any State may deny or abridge the right of citizens of the United States to vote on account of their race, color, or previous condition of servitude.

Appropriate legislation is confined to the prevention of denials or abridgements by a State or the United States.

So that, even had this case been one in which the only action involved was a denial or abridgement by the State, the order of the District Judge dismissing the complaint would have been a correct one. It would have been a correct one for that the reasons assigned for the ruling are correct conclusions of constitutional law as they have been heretofore declared.

As originally enacted in 1870 and as it remained in the statutes from 1870 until 1957, the present subsection (a) of Title 42, Section 1971 (formerly Section 1971 in its entirety), was merely a general statement of principle or of rights without any sanction or remedy for its violation. Standing alone it declared a right but the declaration was unavailing without implementation. So far as this case is concerned, the Civil Rights Act of 1957, in what is now Section 42 U. S. C. 1971 (c), provided the

implementation. That implementation went too far; it exceeded the powers granted to Congress under the Fifteenth Amendment, for under (a) and (c) the Attorney General is permitted to institute proceedings for preventive relief in cases where the alleged deprivation is that of a private citizen acting as a private citizen.

Section (c) standing alone in summary is: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) . . ., the Attorney General may institute for the United States . . ., a civil action or other proper proceeding for preventive relief, including an application for . . . injunction . . ."

What is "the right or privilege secured by subsection (a)"?

The Government has answered that question for us in paragraph one of the complaint (R. 1). It there defined that right or privilege as "the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color."

So, coupling the new 1971 (c) with the old 1971 [1971 (a)], the two together would read:

> "Whenever **any person** has engaged or there are reasonable grounds to believe that **any person** is about to engage in any act or practice which would deprive any other person of the right and privilege of being entitled and allowed to vote at all such elections without distinction of race or color . . . the Attorney General may institute for the United States . . ., a civil action or other proper proceeding for preventive relief, including an application for . . . injunction, . . ."

Thus, as found by the court below, and as one of the reasons assigned for its ruling:

> "Subsection (c) creates a remedy against purely private, as distinguished from state, deprivation of voting rights on account of race or color" (R. 37).

The creation of such a remedy permitting "the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action" (R. 39), is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment. An unbroken line of decisions establishes this principle of Constitutional Law. **United States v. Harris,** 106 U. S. 629; **Civil Rights cases,** 109 U. S. 3; **James v. Bowman,** 190 U. S. 127; **Collins v. Hardyman,** 341 U. S. 651.

In their brief, counsel for the United States assert that the legislative history of the Civil Rights Act of 1957 demonstrates that Congress intended by Section 1971 (a), when used in conjunction with Section 1971 (c), to proscribe only those acts and practices which violate the Fifteenth Amendment (Brief, page 45). Following this assertion are eight pages of copious quotations from and allusions to the hearings before Congressional Committees, Committee Reports, and Floor Debate. During the discussion, counsel say: "But the point is that the measure was generally understood to be aimed only at state action" (Brief, pages 50-51).

Counsel overlooked the colloquy between Senator Ervin and Attorney General Brownell at pages 50-51 of the 1957 Senate Hearings, which was followed by this statement of Senator Ervin at page 344 of the same hearings:

> "Some of the proposed legislation evidently proceeds on the theory that the present court is going to strike down some of those old decisions which hold that the 14th Amendment (sic) cannot be applied to

anything except State action. How the present court can be expected to hold that the simple English used in the 14th Amendment applies to any action other than that of the State exceeds my comprehension."

At page 50 of their brief, footnote 36, counsel allude to the testimony of Senator Talmadge at page 261 of the Senate Hearings. We respectfully call the attention of the Court to Senator Talmadge's testimony at page 258 of the Senate Hearings:

"The proposal to protect the right to vote by providing for injunctive proceedings initiated by the Attorney General against any individual who may be thought to be interfering with the right of another individual to vote is totally without constitutional authority. The Supreme Court has held repeatedly that the 14th and 15th Amendments can be implemented only with respect to State action and only then in cases where the franchise is denied due to unlawful discrimination on account of race, color, or previous condition of servitude."

At this same point in their brief, counsel for the Government allude to Senator Ervin's statements at pages 270 and 308 of those hearings. We respectfully call to the attention of the Court Senator Ervin's comprehensive statement at pages 389-391 of those same hearings.

The case before the Court is a realization of the fears expressed by those Senators.

The Attorney General cannot convert constitutionally inappropriate or invalid legislation into appropriate or constitutional legislation by allegations in a complaint or even by seeking to use that legislation in a case where a State was shown to be abridging or denying the right to vote contrary to the Fifteenth Amendment.

Let us assume that Congress enacted a statute providing that if any person sought to hinder any other person from exercising his right to vote, the Attorney General might institute proceedings in the name of the United States to prevent such hindrance. That statute would be palpably unconstitutional. But, the argument of the Government is that it could nevertheless be used to permit the Attorney General to enjoin state officers in actions which amounted to a State's abridging or denying a person's right to vote on account of his race, color or previous condition of servitude.

The unsoundness of that argument was demonstrated eighty-five years ago in the case of **United States v. Reese, et al.**, 92 U. S. 214. There the Court held:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction, so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there" (op. cit. p. 221).

We do not mean even to intimate that Congress has the power to grant to the Attorney General the right to institute an injunction proceeding in the name of the United States based upon the allegations of the complaint in this case. We confidently assert that pursuant to the Fifteenth Amendment Congress can enact legislation only to prevent

the United States' or a State's abridging or denying the right to vote on account of race, color or previous condition of servitude. We assert that where a person who may be a State officer is acting contrary to the laws of the State and in the teeth of those laws his deeds cannot constitute an abridgement or denial on the part of the State. We do not, however, have the burden of maintaining those assertions here, for what the Congress has done is forbidden by the Reese case. It is true that there the Court was dealing with a penal statute. Here we are dealing with a statute authorizing an injunction, violation of which may carry its own penalty. The principle is the same. During the hearing on the Civil Rights Act of 1957, Senator Ervin said:

> "Certainly, Mr. Attorney General, if Congress has no power to provide any criminal penalties for those acts under the Constitution because it has no right to legislate in that particular area, it certainly would have no right to enact a civil law."

Attorney General Brownell replied:

> "That is correct, and we are not asking for that. Anywhere it has been ruled against under the Constitution of the United States, the Federal Government does not have authority to act, it would still be out under the proposed legislation."

Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, February 14, 1957, p. 25.

In **Illinois Central Railroad Co. v. McKendree,** 203 U. S. 514, 529, Mr. Justice Day speaking for a unanimous court, quoted the language from the Reese case which we have just quoted in support of this ruling:

> "As order of the Secretary of Agriculture, No. 107, purporting to fix a quarantine line under the Cattle Contagious Disease Act applies in terms to all ship-

U. S. C. 1971. It was originally passed in 1870, as a part of the Enforcement Act, consisting of 23 sections, all of which, except it, had been declared unconstitutional or repealed. **Cruikshank v. United States**, supra; **United States v. Jackson**, 26 Fed. Cases, p. 563, Case No. 15459 (1874); **United States of America v. Amsden et al.**, 6 Fed. 819;* **Lackey v. United States**, 107 Fed. 114; **United States v. Harris**, 106 U. S. 629; **James v. Bowman**, 190 U. S. 127. It did nothing more than the Fifteenth Amendment *proprio vigore*. Its own force enabled it to accomplish nothing. Standing alone it could do no more in the way of punishing or preventing than could one of the Ten Commandments. Among those handed down to Moses was "Thou shalt not kill" but murder is punished only when there shall have been passed a valid statute providing for the punishment of murderers.

Counsel for the United States (their brief page 35) say that "42 U. S. C. 1971 (a) was given full force and effect by this court in the recent case of Terry v. Adams, 345 U. S. 461. It was there held that the section was adopted by the Congress 'acting pursuant to the power granted by the second section of the Fifteenth Amendment' (345 U. S. at 468)."

Counsel preface a four page discussion of Terry v. Adams with the statement that "The District Court in the instant case **declined to follow**" it. (Emphasis added.)

What the District Judge **did do** with respect to Terry v. Adams is shown by the following quotation from his opinion:

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* It was in this case (at p. 824) that Judge Gresham said: "The Federal Government can exercise only such powers as have been conferred upon it, and however reprehensible the acts described in the indictment may be unless they are done on account of race, etc., and *under the authority of legislation which is prohibited by the 15th amendment*, it is in the exclusive province of the state to punish the offenders." (Emphasis ours.)

"It should be noted at the outset that this action is one brought by the Attorney General in the name of and on behalf of the United States. It is not an action by the allegedly wronged party under the provisions of 42 U. S. C. 1983, and differs materially from those cases. In that type of case, the 'self-executing ban' of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor, without resort to 42 U. S. C. 1971. It was the availability of this 'self-executing ban' which has heretofore allowed the Supreme Court to apparently by-pass a clear ruling on the constitutionality of Section 1971-a: Terry v. Adams, 345 U. S. 461, 481. In the instant case, however, the Attorney General has no standing for the bringing of this action, except the recently enacted provisions of Section 1971. Any right that he has to seek preventive relief, where citizens allegedly have been or are about to be denied their right to vote on account of race, is based on Section 1971 (c). Prior to its enactment, such an action could not have been entertained. Thus it is that the question of the constitutionality of that Section cannot be sidestepped or by-passed. Due to the wording of subsection (c) of the statute and the way in which it is tied to subsection (a), the latter must be given its first really critical examination.

"As originally enacted and as it remained on the statute books of this country from 1870 until 1957, the present subsection (a) (formerly Section 1971 in its entirety), was **merely a general statement of principle or of rights, without providing any sanction or remedy for its violation.** U. S. v. Reese, 92 U. S. 214; U. S. v. Cruikshank, 92 U. S. 542. **For this reason, no action could ever be based upon this section alone"** (R. 29, Emphasis added).

Terry v. Adams originated in the Southern District of Texas (90 F. S. 595). The District Judge rendered a

decree favorable to the plaintiffs. The Court of Appeals for the Fifth Circuit reversed (193 F. 2d 600). The reason for the reversal was the belief of the Court of Appeals that the acts complained of were those of individuals rather than the State (op. cit. p. 602). This judgment was reversed by the Supreme Court. Mr. Justice Black announced the judgment of the court in an opinion in which Mr. Justice Douglas and Mr. Justice Burton joined (345 U. S. 462, 470), Justice Frankfurter wrote a separate opinion (345 U. S. 470-477) in which occurs this sentence: "The vital requirement is **State responsibility**—that somewhere, somehow, to some extent, there be an infusion of conduct by state officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored" (op. cit. p. 473, emphasis supplied). Justice Clark with whom Chief Justice Vinson and Justices Reed and Jackson joined, concurred (pp. 477-484). They (footnote 9) deemed the activities of the "Jaybird Democratic Association" unlawful under the independent reach of the Fifteenth Amendment. Justice Minton dissented (pages 484-494).

(The Court had in **Smith v. Allwright** [1944], 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987, held that the Democratic Party of itself, and perforce any other political party, was prohibited by the Fifteenth Amendment from conducting a racially discriminatory primary.)

Justices Black, Douglas and Burton in their opinion referred to Smith v. Allwright (op. cit. 466), and affirmed "the District Court's holding that the combined Jaybird-Democratic-general election machinery has deprived these petitioners of their right to vote on account of their race and color."

Justices Clark, Reed, Jackson and Chief Justice Vinson "agreed with Chief District Judge Kennerly that the Jaybird Democratic Association is a political party whose

activities fall within the Fifteenth Amendment's self-executing ban" (op. cit. 482).

They did not deem it necessary to consider the applicability of 8 U. S. C., Sec. 31 [afterwards Sec. 42, U. S. C., Sec. 1971 (a)]. They so stated at page 481.

So that the rationale of the opinions of these seven Justices seems to be: We held in Smith v. Allwright that rules of the Democratic Party of Texas excluding Negroes from voting in the party's primaries violated the Fifteenth Amendment; the acts of the Jaybird party were the acts of the State, and when the Jaybird party denied or abridged, it was denial or abridgement by the State of Texas.

The constitutionality of Title 42-1971 was not considered by the Court.

Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253, was cited (345 U. S. at p. 481) and it was stated that that case expressly refrained from constitutional questions. The District Judge in the case at bar made a similar observation with respect to Collins v. Hardyman (R. 27).

While Collins v. Hardyman may have "refrained from constitutional questions," Justice Jackson speaking for the majority reiterated and emphasized the rule that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" (op. cit. p. 658, citing **Shelley v. Kraemer**, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161). And he called attention to the fact that Justice Douglas had written in **United States v. Williams**, 341 U. S. 70, 92, 71 S. Ct. 581, 593, that the Fourteenth Amendment does not protect against wrongs done by individuals.

Title 42 U. S. C., Sec. 1971, was merely a general statement of principle or of rights, without providing any sanction or remedy for its violation. When, in 1957, the Congress sought to implement it by providing a sanction or remedy

for its violation, Congress sought to use as an implement a statute of the very type which had been declared unconstitutional in **James v. Bowman**, 190. U. S. 127. Of that case, counsel for the United States make only one mention in their brief. They say of it: "In a subsequent case, James v. Bowman, 190 U. S. 127, this court held that the Fifteenth Amendment applies only to governmental action and that legislation purporting to be an exercise of the power granted by Section 2 of the amendment which proscribed acts of private individuals was not 'appropriate legislation' within the meaning of that amendment."

Let us lay side by side the statute involved in James v. Bowman, and that section of the Civil Rights Act of 1957 now known as Title 42, U. S. C., Sec. 1971 (c):

Section 5507 of Revised Statutes	**Title 42, U. S. C., Sec. 1971 (c)**
"Every **person** who prevents, hinders, controls, or intimidates **another** from exercising, or in exercising, the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section." (Emphasis added.)	"Whenever any **person** has engaged or there are reasonable grounds to believe that **any person** is about to engage in any act or practice which would deprive any **other person** of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order or other order . . ." (Emphasis added.)

ments whether interstate or intrastate, it is void as an attempt to regulate intrastate commerce, notwithstanding it is the same line as that fixed for a similar purpose as to intrastate shipments by the State through which it passes."

In the course of the opinion, Justice Day wrote:

"Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears from the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing" (op. cit. p. 529).

The same language was quoted by the Court in **Butts v. Merchants Transportation Co.**, 230 U. S. 126, 134, a case which involved the constitutionality of Sections 1 and 2 of the Civil Rights Act of March 1, 1875, as applied to vessels of the United States engaged in the coastwide trade.

The ruling of the unanimous court was:

"The provisions of the Civil Rights Act having been declared unconstitutional as to their operation within the States, Civil Rights Cases, 109 U. S. 3, they are not separable as to their operation in such places as are under the exclusive jurisdiction of the National Government and the statute is therefore unconstitutional in its entirety. The Trade Mark Cases, 100 U. S. 82."

The Butts case was an action to recover penalties.

At page 26 of their brief, counsel for the government make this sweeping statement:

"But there is no need to distinguish the Reese case because, for at least forty years, the approach there

taken has not been followed by this Court." (Here follows a footnote 9 which reads: During the approximate thirty-year period after the decision in the Reese case, the Reese approach was followed in a few cases. See, e. g., Trade-Mark Cases, 100 U. S. 82; Illinois Central Railroad v. McKendree, 203 U. S. 514; The Employers' Liability Cases, 207 U. S. 463; decided in 1879, 1906 and 1908, respectively. But, since then, it has generally been disregarded.) See, e. g., **El Paso & N. E. Ry. Co. v. Gutierrez**, 215 U. S. 87, and the cases discussed at pages 18-22, supra, in several of which the Court found that the statute was valid as applied and refused to consider the question of its validity in hypothetical circumstances, in effect severing one application from another."

In making such a statement, counsel for the Government have either overlooked, or hope we have overlooked, this Butts case. They do not even cite it. Their failure to cite it is natural, for it absolutely refutes their contention that El Paso & N. E. Ry. Co. v. Gutierrez has supplanted the Reese case. The Butts case, decided June 16, 1913, expressly distinguishes El Paso and N. E. Ry. Co. v. Gutierrez (op. cit. pages 137 and 138) and follows the Reese case (p. 133) as well as the Trade-Mark cases, and the other cases cited by the Government in their footnote 9. The Butts case was a unanimous decision handed down by a court composed of Chief Justice White, and Associate Justices McKenna, Holmes, Day, Lurton, Hughes, Van Devanter, Lamar and Pitney.

The words of the court in the Butts case were paraphrased and applied by the court in 1936 in **Carter v. Carter Coal Co.**, 298 U. S. 238, 316 (56 S. Ct. 875).

It was cited approvingly in **Williams v. Standard Oil Co.**, 278 U. S. 235, 242, and its rule recognized by Justice Brandeis in **The Chicago Junction case** (1924), 264 U. S. at page 290.

Mr. Chief Justice Taft writing for a unanimous court cited the Reese case and the Butts case approvingly in **Hill v. Wallace**, 259 U. S. 44, 70 (42 S. Ct. 459).

And regardless of what may be the fate of **United States ex rel. Guagliardo v. McElroy**, 259 F. 2d 927 (certiorari granted, 359 U. S. 904, 79 S. Ct. 580); in this court, the Government must have known the rule of the Reese case, and the Butts case was followed in it by the United States Court of Appeals for the District of Columbia Circuit as late as September 12, 1958. The majority there cited approvingly not only the Reese case and the Butts case, but another decision of Chief Justice Taft's which had followed and applied them, namely, **Yu Cong Eng v. Trinidad**, 271 U. S. 500, 518-522, 46 S. Ct. 619, 623-625.

Whether or not the statute is penal makes no difference in the application of the rule of law of the Reese case. But, if it did—this statute is penal in its nature. While Section 42-1971 (c) authorizes the institution of a civil action for preventive relief, Section 42-1971 (e), a part of the same Act, provides for the citation and trial of persons cited for contempt under this Act.

The Reese case was followed in the **Trade Mark Cases**, 100 U. S. 82, 98. There the precise ruling was:

> "That legislation is void for want of constitutional authority, inasmuch as it is so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to the control of Congress."

United States v. Reese, supra, was affirmed and applied in **Baldwin v. Franks**, 120 U. S. 678.

In **United States v. Ju Toy**, 198 U. S. 253, 262, Mr. Justice Holmes said that the principle of the Reese case "has been decided over and over again."

Counsel for the Government argue that this case "is one to which the rule of 'standing to challenge' clearly applies" (Brief, p. 20).

They say the "District Court permitted the defendants to challenge the validity of the Act on the ground that it might be applied to private action as well as state action, although these defendants were engaged in state action when they performed the acts alleged in the complaint" (Ibid).

As a matter of fact, as we have shown somewhat more in detail, the complaint alleges that the acts and practices complained of were "designed and intended by defendants . . ." (R. 4); that they "arbitrarily and without legal cause" prevented the Negro citizens from demonstrating their ability (R. 6); that they "arbitrarily and without legal cause" rejected another (R. 7); that the "application of different standards by defendants . . . was not accidental, but was designed and intended by them to discriminate against Negro applicants . . ." (R. 7).

If these allegations are true, the actions of defendants (appellees) could certainly not be classified as "state action". More certainly what they did, if they did, could not be classified as an abridgement or a denial on the part of the State of Georgia.

This so-called "standing to challenge" rule was comparatively recently considered by the Court in **Barrows v. Jackson**, 346 U. S. 249 (1953). In an opinion written by Mr. Justice Minton, evidently concurred in by Associate Justices Black, Frankfurter, Douglas, Burton and Clark, it is stated:

> "This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state **court** which might result in a denial of constitutional rights and in which it would be difficult if not

impossible for the persons whose rights are asserted to present their grievances before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, **which is only a rule of practice,** are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 192, p. 1021, 12 ALR 1190. **In other unique situations** which have arisen in the past, **broad constitutional policy** has led the Court to proceed without regard to its usual rule" (op. cit. 346 U. S. 257, 73 S. Ct. 1035) (Emphasis added, except as to word "court").

Then follow some nine examples of cases in which the Court had proceeded without regard to the rule.

Perhaps, if it were necessary, the Court would here permit "broad constitutional policy" to outweigh this "rule of practice."

It is not necessary that the court take that action.

Under the circumstances here, the appellees had a perfect legal right and perfect standing to assail the validity of the statute.

In the first place there exists "no other basis for an action by the Attorney General in the name of the United States seeking the remedy here sought" (R. 40) than the act attacked. If it is void, the court had no jurisdiction of the action.

In the second place, these appellees **are** in position to assert that the act is an entirety and that its invalidity in certain respects renders the whole act invalid.

In support of the foregoing two propositions we refer to 11 American Jurisprudence, Constitutional Law, Section 112.

In **Mountain Timber Company v. Washington**, 243 U. S. 219, the Court considered the constitutionality of the Workmen's Compensation Act of the State of Washington. At the threshold, it held:

> "The act not being valid against employers if not valid as against employees, an employer may question its constitutionality in both aspects" (243 U. S. 220).

Applying that principle here—The statute not being valid against states or persons allegedly acting for states if it is not valid as against persons not acting for states, a state or persons allegedly acting for states may question its constitutionality in both aspects.

> "One having a claim against a city for personal injuries sustained in consequence of a defect in a street may question the constitutionality of a charter provision making actual knowledge of a city officer for at least twenty-four hours prior to the occurrence of the injury or damage a condition of liability for injury to person or damage to property, as violating a constitutional provision against the taking of property for public use without adequate compensation being made, since the invalidity of the charter provision so far as it relates to damage to property will render the entire act void."

Hanks, et ux. v. City of Port Arthur, 121 Texas 202, 48 S. W. 2d 944, 83 ALR 278, 279 (4).

At page 283 (of 83 ALR) Chief Justice Cureton speaking for the court said:

> "It is true that in the case before us the question of taking property in violation of the Constitution is not in issue, but the validity of the charter section may be raised, and, if void for any reason, it cannot be enforced in this case. 12 Corpus Juris, p. 764; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; State v. Bengsch, 170 Mo. 81, 70

S. W. 710; State v. Cumberland Club, 136 Tenn. 84, 188 S. W. 583."

"The receiver of an insolvent state bank in the assets of which a preference is claimed under a state 'Bank Collection Code' with respect to a clearance draft drawn by such bank in favor of the claimant has a right to raise the question of constitutionality of the act on the ground of its invalidity as applied to national banks and the inseparability of its provisions rendering it invalid in its entirety."

People of the State of Illinois ex rel., Barrett v. Union Bank and Trust Co., 362 Ill. 164, 199 N. E. 272, 104 ALR 1090 (6).

In the third place, these appellees are "persons" who have a right to challenge the validity of all parts of the Act. True it is that the complaint alleges that while they were discharging their duties as registrars they "were acting under color of law of the State of Georgia" (R. 2). Equally true it is that the alleged acts and practices of the defendants complained of were allegedly **designed** by them, and intended by them to accomplish certain results. Equally true it is that they have allegedly acted "arbitrarily and without legal cause" (R. 6; R. 7). Their alleged designs, deeds and intentions are not the designs, deeds and intentions of the State of Georgia. Therefore even if their "acts and practices" were in fact committed, the "acts and practices" would not be those of the State of Georgia and therefore there would be no denial or abridgement on the part of the State of Georgia. These appellees are "persons" who have a right to challenge that portion of the statute which authorizes a suit against "persons." If these appellees had planned and done what they are accused in the complaint of having planned and done, those plans and acts would have been "without authority from the State and the State is in nowise involved." (**Orleans**

Parish School Board v. Bush, 242 F. 2d 156, 161, per Judges Tuttle, Rives and Brown.)

The same court which decided the Bush case, supra, also decided **Reddix v. Lucky,** 252 F. 2d 930. Judge Tuttle wrote the opinions in both cases. In the latter case Judge Borah concurred with him; Judge Cameron dissented from a holding that the complaint there stated a cause of action. The reason for the holding seemed to be that the complaint alleged "that the defendant, acting in her official capacity, participated in an illegal challenge of plaintiff's right to vote, and, by her own illegal failure to comply with the state law respecting the processing of such a challenge, caused his name to be improperly struck from the voters' rolls, all of which acts were done by her solely because he was a member of the Negro race and in violation of specified provisions of the Constitution, . . ."

So it is that the Court held in the Bush case that the suit was not one against the State forbidden by the eleventh amendment because the laws under which the board purported to act were invalid, and that therefore the board was acting without authority from the State and the State was in nowise involved, while in Reddix v. Lucky it held that a suit could be maintained which had as its requisites abridgement or denial by a State under circumstances where the abridgements or denials were participation by the registrar in an illegal challenge of plaintiff's right to vote, and "her own illegal failure to comply with the state law."

Georgia Railroad and Banking Co. v. Redwine, 342 U. S. 299, 72 S. Ct. 321, 96 L. Ed. 325, was cited in the Bush case. It was not cited in Reddix v. Lucky.

There this Court said:

> "This court has long held that a suit to restrain unconstitutional action threatened by an individual

who is a state officer is not a suit against the state" (342 U. S. at p. 304).

That being true, how could unconstitutional actions designed and performed by individuals who are state officers, which actions are contrary to the laws of the State, be deemed a denial or abridgement by the State of the rights of those against whom the actions are directed?

Further the court said:

> "The State is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority" (op. cit. 305-6).

This being true, does it not follow that the acts of individuals who act as officers without constitutional or state statutory authority can not be deemed abridgements or denials by the State?

Why does not the rule of Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 453, 52 L. Ed. 714, quoted in the Bush case (242 F. 2d 161), but not in Reddix v. Lucky, apply?

If these appellees designed and performed the acts alleged, why are they, too, not "stripped of (their) official or representative character and . . . subjected in (their) person(s) to the consequences of (their) individual conduct"? (See Snowden v. Hughes, 321 U. S. 1, 13, 16.)

The only obligation resting upon the United States with respect to the Fourteenth and Fifteenth Amendments is to see that the **States** do not deny rights secured by the amendments. This the amendments guarantee, but no more. The power of the national government is limited to the enforcement of this guaranty. **Cruikshank v. United States**, 92 U. S. 542, 555.

Section 42 U. S. C. 1971 (a), as it existed prior to the passage of the Civil Rights Act of 1957, had been 42

Of Section 5507, this court said more than a half century ago:

The Fifteenth Amendment "relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. While Congress has ample power in respect to elections of Representatives to Congress, Sec. 5507 cannot be sustained under such general power because Congress did not act in the exercise of such power. On its face the section is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, State and Federal, and not in pursuance of the general control by Congress over particular elections. It would be judicial legislation for this court to change a statute enacted to prevent bribery of persons named in the Fifteenth Amendment at all elections, to one punishing bribery of any voter at certain elections."

James v. Bowman, 190 U. S. 127.

In the light of this decision, and of all the others which have been cited, we cannot but wonder why the Congress chose so to implement Section 42, U. S. C., Sec. 1971. Were not the Executive and Legislative Departments convinced of the unconstitutionality of that legislation which is now Title 42, Section 1971 (c), as linked with 1971 (a)? Did those departments think the Judicial Department was wrong in those prior rulings? Or did they think they could persuade the Judicial Department to alter its previous rulings?

There is a doctrine being preached that people are evil who pursue either one of the courses indicated by these queries.

We respectfully submit that under the law of the land as it has been declared for almost a century, the District Judge was correct in holding that the legislation he held

unconstitutional was not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States.

THE CROSS-APPEAL.

The additional questions presented by the cross-appeal are shown at pages 43-44 of the record.

Questions 1 and 4* of the cross-appeal may be discussed together, for we submit that the Congress does not have the power to authorize the Attorney General to institute for the United States a civil action of the nature described in Title 42, U. S. C. A., Sections 1971 (c) and (d).

Section 1971 (c) has been quoted.

Section 1971 (d) is:

> "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

Under Title 28, U. S. C., Sec. 1345, district courts of the United States have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

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* These questions are:

"1. Whether the Congress of the United States, under the Constitution of the United States, had any authority to authorize the Attorney General of the United States to institute a civil action for preventive relief for or on behalf of the United States of the nature described in 42 United States Code 1971 (c), and under the circumstances therein stated;"

"4. Whether Congress has the right, under the Constitution of the United States, to direct District Courts of the United States to exercise their jurisdiction, and grant preventive relief as to acts with respect to which persons aggrieved had not exhausted their other remedies;" (R. 43-44).

The United States has no authority to commence this action and seek the relief it does seek in the absence of a valid act authorizing it so to do.

Does the Congress have the power to authorize the Attorney General to institute a civil action of the nature described in Title 42, U. S. C. A., Sections 1971 (c) and (d)?

> "One of the fundamental principles of the American constitutional system is that the governmental powers are divided among the three departments of government, the legislative, executive and judicial, and that each of these is separate from the others."
>
> 11 Am. Jur., Constitutional Law, Sec. 180.

> "Its object is basic and vital, Springer v. Government of Philippine Islands, 277 U. S. 189, 201; namely to preclude a commingling of these essentially different powers of government in the same hands."
>
> O'Donoghue v. United States, 289 U. S. 516, 530.

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a State and citizens of another State; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."
>
> Constitution, Art. 3, Sec. 2, cl. 1.

In the court below, the Government indulged in the assumption that we assume that the judicial power of the

United States under this provision extends **only** to cases in law and equity arising under the Constitution, laws and treaties of the United States.

That is not our assumption or argument.

We recognize that the judicial power extends to nine classes of cases.

We are co[illegible]erned here with only two of these classes—with only one, really. For, while "Article III also gives jurisdiction to the courts in 'controversies' to which the United States shall be a party, whether or not such controversy be also a case in law or equity," the question here is whether the United States of America is properly a party. The United States of America could not institute and prosecute this suit and seek the relief sought in it were it not for the Civil Rights Act of 1957. So the question is:

Does the Congress of the United States have the constitutional power to authorize the Attorney General to institute for the United States, or in the name of the United States, **an action in equity** whenever any person shall have engaged in certain acts or practices which would deprive other persons of certain rights, and to provide that the District Courts of the United States shall have jurisdiction of such an action and shall exercise that jurisdiction without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law?

The Court will notice that in stating the question we use the phrase, "an action in equity." We substitute that phrase for the words of the statute which are: ". . . a civil action or other proceeding for preventive relief, including an application for a permanent injunction, restraining order, or other order . . ."

We make that substitution because the only civil action which could result in orders or decrees granting pre-

ventive relief, or restraint or injunctive relief, would be an action in equity.

And thus the question is even more narrowed.

Does the Congress have the constitutional power to authorize the Attorney General to institute in the name of the United States an action for injunction seeking redress not of wrongs done or threatened to the United States but for alleged deprivations of the rights of persons, and to direct the courts to exercise jurisdiction of such a proceeding and to exercise it without regard to whether the party aggrieved shall have exhausted any administrative or other remedies which may be provided by law?

That statute violates the fundamental principle of the American constitutional system in that in it the legislative department encroaches upon the exclusive powers of the judiciary. The legislative department attempts to tell the judiciary: "You **shall** exercise the jurisdiction we are conferring on you; you shall exercise that jurisdiction without regard to whether the party aggrieved shall have exhausted his remedy at law or not; you shall exercise that jurisdiction regardless of whether the aggrieved party shall have an adequate remedy at law or not; you shall discard the fundamental rule of equity jurisprudence that "a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity . . . is of special force when resort is had to the federal courts to restrain the action of state officers." (**Natural Gas Pipe Line Co. v. Slattery**, 302 U. S. 300, 310, with citation of cases.)

That statute authorizes the institution of a proceeding seeking equitable remedies, which so far departs from the established principles of equity jurisprudence that an action instituted pursuant to it cannot be deemed a case in law or equity arising under the Constitution or laws of the United States.

It cannot be deemed a case in law for it must be a "civil action or other proper proceeding for preventive relief" [the words of the statute—section (c)].

It cannot be deemed a case "in equity" for the statute authorizing it attempts to strip the courts of every vestige of those fundamental principles upon which equity jurisdiction traditionally and constitutionally rests.

The law of this land is:

> "The settled ground upon which equity jurisdiction rests and doubtless the great underlying principle on which it was originally assumed is the lack of an adequate and complete remedy at law. This is likewise the foundation and indispensable prerequisite for the exercise by equity of its power to grant injunctive relief."
>
> 28 Am. Jur., p. 232, Injunctions, Sec. 37;
> Fox v. Standard Oil Co., 294 U. S. 87;
> Lee v. Brickell, 292 U. S. 415;
> Phoenix Mut. Ins. Co. v. Bailey, 13 Wall. 616.

The statute [42-1971 (c) (d)] authorizes the institution by the Attorney General of a civil action seeking equitable relief which action would lack every principle of equity jurisdiction.

The statute authorizes such a proceeding not because the United States of America or the party aggrieved would be entitled to it under what had been the law of the land since there has been a land (**Irwin v. Dixon,** 9 Howard 10, **Truly v. Wanzer,** 5 Howard 141); it authorizes it not on the basis of "those fundamental and established principles by which courts of equity are guided and influenced in their judicial action and in the administration of relief" (28 Am. Jur. 216; Injunctions, Sec. 23); it authorizes it without the necessity of the complainant establishing that the relief sought is necessary to prevent great and irreparable injury (28 Am. Jur., p. 242; Ibid, p. 217, Sec. 24).

It authorizes the institution of an equitable proceeding merely because a majority Congress deemed it desirable to wipe out all principles of equity jurisprudence in the field of "Civil Rights."

Fortunately for the people of the United States, Congress has no such constitutional right. For if Congress can wipe out those principles in one field, it can in all. Equity jurisdiction is what it is. Equity jurisdiction is what the courts declare it is, not what Congress says it is.

By virtue of the constitutional recognition of the division of ordinary civil jurisdiction of the Federal Courts into cases at law and cases in equity it is beyond the power of Congress to make any serious change in that classification (19 Am. Jur., p. 44, n. 16).

One of the reasons for such lack of power is that the right of trial by jury is preserved by the Seventh Amendment in suits at common law.

Congress cannot convert a law action into an action in equity by legislative fiat, and thereby deprive defendants of whatever rights they may have as to a jury trial.

Congress cannot create a cause of action in some suitor, even the United States of America, and clothe it with the attributes of an action in equity when it is not an action in equity.

Congress cannot create a cause of action in some suitor, even the United States of America, and confer upon that suitor extraordinary rights and privileges when the suitor, under established principles of equity jurisprudence, is not entitled to them.

To decide that Congress has any such power is to ignore the well established principle that the line between equitable and common law jurisdiction must be maintained.

Heine v. Levee Commissioners, 19 Wall. 655, 660.

The Seventh Amendment must be construed in the light of the practice in the courts of law and chancery in England when our Constitution and that amendment were adopted.

Liberty Oil Co. v. Condon National Bank, et al., 260 U. S. 235, 243, 43 S. Ct. 118 (7).

So must the phrase "cases in equity" be construed.

"The jurisdiction in equity of the Federal courts is, subject to the limitations of the Constitution, substantially the same as that of the English Court of Chancery."

Foster's Federal Practice, Vol. 1, Section 5, citing:
Root v. Railway Co., 105 U. S. 189;
Fenn v. Holme, 21 Howard 481.

"Equity jurisdiction, of course, is a basis for action or realm of power dependent upon chancery precedents of long standing and to which recourse must still be had to determine whether any relief can be granted in a particular situation."

Cyclopedia of Federal Procedure, Third Edition, Vol. 1, Sec. 20164.

The jurisdiction conferred on the Federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was administered by the English court of chancery at the time of the separation of the two countries.

Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 83 L. Ed. 987, 59 S. Ct. 657, 660, citing:

Payne v. Hook, 7 Wall. 425, 430;
In re: Sawyer, 124 U. S. 200, 209;
Matthews v. Rodgers, 284 U. S. 521;
Gordon v. Washington, 295 U. S. 30.

While Justice Stone was there dealing with the phrase "in equity" as used in Section 11 of the Judiciary Act of

1789, the same reasoning would apply to the use of the same phrase in the Constitution.

> "The Courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress . . .; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."
>
> Michaelson v. United States ex rel. C. St. P. M. & O. R. Co., 266 U. S. 42, 35 ALR at p. 457.

While there the court was discussing the inherent power of a court to punish contempts, a fortiori would the principle apply to a suit "in equity."

That is demonstrated by the citation by the Supreme Court of the Michaelson case in **Sprague v. Ticonic National Bank**, 307 U. S. 161, 165, 59 S. Ct. 777, 779, holding: "The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act constituted that body of remedies, procedures and practices which theretofore had been evolved in the English court of chancery, subject, of course, to modifications but not subject to a total destruction of the inherent attributes."

"The remedies in the courts of the United States, at common law and in equity, are to be . . . according to the principles of common law and equity, as distinguished in that country from which we derive our knowledge of these principles."

Robinson v. Campbell, 3 Wheaton 212 (1818).

Constitution 1874, Art. 7, Sec. 15, conferring on the circuit courts jurisdiction in matters of equity until the legislature shall establish courts of chancery, refers to such jurisdiction as a court of chancery could properly exercise

at the time of the adoption of the Constitution, and, though the Legislature may create courts of chancery and vest the same with jurisdiction in matters of equity, it may not enlarge their jurisdiction when created.

Gladish v. Lovewell, 130 S. W. 579, 581, 95 Ark. 618.

What are some of the inherent attributes to the exercise of equity jurisdiction of which this statute would strip the District Courts?

It is fundamental, in equity jurisprudence, that the complainant must stand or fall on the merits of his own case. The Supreme Court stated the principle in **McCabe v. AT&SF R. Co.** (1914), 335 U. S. 151, 162, thus:

> "But we are dealing here with the case of the complainants and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainants' need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured, are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."
>
> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal

courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.''

Alabama Public Service Commission et al. v. Southern Railway Co., 341 U. S. 341, 349-50.

If the Lowes, the Gibsons, and Breedlove, had been deprived of any right secured to them by the Fifteenth Amendment, the Congress of the United States would not have the constitutional power to **direct** a Federal District Court to take jurisdiction of a proceeding instituted by them seeking general supervision over registration of negroes in the county of their residence, and compel that Court to exercise that jurisdiction whether the complainants had exhausted any administrative or other remedies that may be provided by law.

A fortiori, the Congress of the United States has not the constitutional power to authorize the Attorney General to institute a civil action seeking an injunction because persons had been or were about to be deprived of their rights; to direct a Federal District Court to take jurisdiction of such a proceeding; and to compel that court to exercise that jurisdiction whether these persons had exhausted their administrative or other remedies provided to them by law, and in so doing deny a jury trial to those sued by the United States.

The Constitution of the United States simply does not comprehend such an action as being within the purview of the phrase ''action in equity'' as used in the Constitution. **(Brown v. Board of Trustees of LaGrange Independent School District et al.,** 187 F. 2d 20 [5th Cir.].)

Question 2 of the cross appeal is:

"Whether, even if Part IV of the Civil Rights Act of 1957 is constitutional, the complaint states a cause of action upon which the relief sought can be granted."

Does it not reveal on its face that the negro citizens named therein have not been deprived by the State of Georgia of any right to vote which they may have, and further, does it not show on its face that the State of Georgia has not abridged any right to vote which they may have?

Preliminary to a discussion of these questions, we suggest that the complaint tacitly admits the invalidity of the statute.

The statute purportedly authorized the Attorney General to institute a civil action whenever any person had engaged or there were reasonable grounds to believe that any person was about to engage in any act or practice which would deprive any other person of a right or privilege secured by subsections (a) or (b).

The statutory key given to the Attorney General to unlock the door of the Federal Courts was an act or practice of a **person.**

The Department of Justice doubtless realized that such a key lacked constitutional validity under the Fifteenth Amendment. It must have realized that for the Fifteenth Amendment to become operative, the United States or a State must be guilty of acts or practices constituting denials or abridgements.

Seeking to cure this fundamental defect in the statute, and so to amend it, the complaint alleges that the defendants in their official capacities "are and have been responsible for the registering in that county of qualified persons who desire to vote," and that "while discharging the duties of the offices aforesaid were acting under **color of law,** of the State of Georgia." (Emphasis added.)

We confidently assert that **even if** the statute had contained a provision that the acts or practices engaged in by "any person," must have been done "under color of law of a State or the United States," that additional provision would not have rendered the statute constitutionally valid.

We so contend because it is fundamental that for Congress to be authorized to enact legislation pursuant to the Fifteenth Amendment, the legislation must be appropriate. The legislation cannot be appropriate unless it deals with denials or abridgements by a State or the United States; with acts done by or under the authority of the Constitution or laws of any State, Territory or the United States.

The Congress which enacted the Civil Rights Act of 1870 realized that in Sections 2 and 3 of the Act.

Of course, the abridgements and denials must have the additional factor of having been done on account of race or color.

A fortiori, if the statute does not contain those essential elements, they cannot be supplied by an averment in the complaint.

The complaint does not state a claim upon which relief can be granted because:

(1) The statute which purportedly authorizes the Attorney General to institute it lacks the essential elements of abridgement or denial by the State on account of race or color which must constitutionally be conditions of any appropriate legislation;

(2) The complaint itself negatives those essential elements.

We have previously herein very much in detail pointed out that the alleged acts of the defendants were their individual acts (Complaint, paragraphs 9, 14, 16, 18) (Record, pages 3, 6, 7).

In the Government's brief in the court below it was stated:

> "The standards which are a prerequisite to registration in Georgia are not here under attack, **but only the practices of certain state officials in administering those standards.**" (Emphasis added.)

When we realize, as we must, that the Congress can legislate, the Courts can adjudicate, only when the United States or a State denies or abridges a person's right to vote on account of race or color, would not that statement have been sufficient to necessitate a dismissal of this action?

We realize, of course, that it has been stated in some cases (e. g., **Peavy v. Cox**, 190 F. 2d 123; **Cook v. Davis**, 178 F. 2d 595) that "the fact that he is an officer acting under color of State law makes what he does State action within the prohibition of the Fifteenth Amendment."

Because of such statements, it has been **assumed** that the phrase "state action" was the legal equivalent to denial or abridgement by a State.

Those statements and assumptions are not decisive of the question here made.

Those questions are: Is there a deprivation or abridgement by a State within the meaning of the Fifteenth Amendment when registrars design practices of their own, and arbitrarily refuse to apply the State law, as alleged here? (That is the fifth question in the cross-appeal.)*

There cannot be an abridgement or denial by the State within the meaning of the Fifteenth Amendment until the corrective processes permitted by the State law have been followed. The **State** cannot be said to have deprived or

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* "5. Whether the right of citizens of the United States to vote is denied or abridged by a State when voting registrars charged with the duty of administering state laws allegedly design practices of their own, and allegedly arbitrarily refuse to apply the state law;" (R. 44).

abridged a person's rights when, as alleged here, persons design practices for the purpose of arbitrary discrimination in violation of ..e State laws, and the person aggrieved does not avail himself of the corrective remedies the State has provided.

By its Act of 1958 (Ga. Ann. Code, Pocket Part, Sections 34-117, et seq.) Georgia has provided that when an applicant appears before a board of registrars for examination, the board **shall** proceed as provided in that Act. [See Appendix hereof "A" for Sec. 34-117 (a) and (b).]

If the applicant qualifies on the basis of literacy (Sec. 34-117), his "card **shall** be marked approved, and the applicant **shall** be considered a registered voter." Throughout this subsection the imperative "shall" is used.

If the applicant seeks to qualify on the basis of good character and understanding of citizenship [34-117 (b)], he "shall be given an examination based upon a standard list of questions as hereinafter provided."

Throughout the following section providing for an oral examination (Sec. 34-118) (Appendix B), the word "shall" is used—seven times. The next section (Sec. 34-119) (Appendix C) provides for a standard list of questions which **shall** be propounded. When the registrars under the statute (Sec. 34-122) perfect a true and correct list of the qualified voters, they **shall** place on those lists certain persons.

If a registrar "designs" acts and practices, intended by him to deny citizens the right to vote (Par. 9 of complaint, R. pp. 3-4); **if** he arbitrarily and discriminatorily delays handling applications of negroes; **if** he **arbitrarily** refuses to register negroes who are actually qualified; **if** he discriminatorily applies different and more stringent standards to negroes than those applied to whites, he is proceeding, not only in violation of provisions of state law, but in opposition to plain prohibitions of the State law.

His acts and practices, therefore, cannot be deemed the **constitutional** equivalent of denial or abridgement **by the State.**

A fortiori is this true when the State has not been given an opportunity to correct the alleged arbitrary and discriminatory conduct, although it has afforded a remedy for any person who is really seeking to register to vote.

(Code Sec. 34-116, Pocket part, Ann. Code);
(Appendix "D").

In this situation the unanimous ruling of the Supreme Court of the United States in **Barney v. The City of New York** (per Chief Justice Fuller), 193 U. S. 430, controls.

There the court held:

> "Where the jurisdiction of the Circuit Court is invoked on the ground of deprivation of property without due process of law in violation of the Fourteenth Amendment, it must appear at the outset that the alleged deprivation was by act of the State."

After reviewing several cases, and distinguishing **Reagan v. Farmers Loan and Trust Co.**, 154 U. S. 362, the court said:

> "In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions."

In its brief below, the Government said: "The action is against voting officials of Terrell County, Georgia, to **enjoin their discriminatory acts in denial or abridgement of the right to vote**, on the sole ground of race, to otherwise qualified persons. The fact that they are officers acting pursuant to authority delegated by the State, and thus 'under color of State law,' renders their acts state action within the prohibition of the Fifteenth Amendment, but does not make the suit one against the state." Citing **Screws v. United States**, 325 U. S. 91. (Emphasis added.)

We emphasize certain words in the first quoted sentence because they are an admission by the Government that the action is not one to enjoin any denial or abridgement by the State of Georgia, but is one to enjoin discriminatory acts of persons who are registrars ("their discriminatory acts").

In drawing the conclusion it did from the Screws case, the Department of Justice entirely ignored the fact that Screws was prosecuted for violating a statute—Section 20 of the Criminal Code—which penalized willful deprivation under color of law of any right secured by the Constitution.

Here, the statute involved (Sec. 42-1971 a, c, d, e) does not contain the phrase "under color of State law."

If it did, we would have the Constitutional question: Is any act done by a public official **under color of State law,** unauthorized and prohibited by State law, an act of the State depriving or abridging one's right to vote by reason of race or color?

While **the complaint** alleges (R. 2) that the defendants were acting under color of State law, the complaint also shows: (a) That the acts were arbitrary; (b) That they were the result of designs, not of the State, but of the defendants; (c) That the State had not been given the opportunity to discipline them; (d) That the alleged acts of defendants were in violation of the State law; (e) That the alleged acts of the defendants were in opposition to plain prohibitions of the State law.

> "Where a city, in enacting a minimum rate ordinance, acts without legislative authority, the ordinance is not an 'act of the state' within the meaning of the Fourteenth Amendment to the federal Constitution, prohibiting a state from passing a law de-

priving a citizen of his property without due process of law, etc."

Portland Ry. Light & Power Co. v. City of Portland, 200 Fed. 890 (1).

"A municipal ordinance passed pursuant to the authority of the State which abridges the privileges or immunities of a citizen or deprives a person of property without due process of law may be therefore an act of the State prohibited by the Constitution. But the ordinance to come within the prohibition of the amendment must, by implication at least, express the will of the State. It must be the act of the State."

Seattle Electric Co. v. Seattle R. & S. Co. 185 Fed. 365 (4), 370 (This case is cited 13 ALR. 2d 399).

At page 370, it cites **City of Louisville v. Cumberland Telephone & Telegraph Co.**, 155 Fed. 725 (C. C. A. 6th Circuit), in which Judge Lurton writing for the court, held that a federal court was without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance on the ground that it impaired the obligation of a contract or deprived the complainant of property without due process of law, in violation of the Constitution of the United States, when the bill alleged that no power had been granted to the municipality or legislature of the state to pass such ordinance.

That case cites:

Murray v. Charleston, 96 U. S. 432, 440;

New Orleans Water Works v. La. Sugar Co., 125 U. S. 18, 31;

Hamilton Gas Light Co. v. Hamilton (Justice Harlan), 146 U. S. 258, 266;

Iron Mountain R. Co. v. Memphis, 96 Fed. 113, 126;

St. Paul Gas Co. v. St. Paul, 181 U. S. 142, 148;

Barney v. City of New York, 193 U. S. 430;

Savannah, etc., Ry. Co. v. Savannah, 198 U. S. 392.

In this City of Louisville case, Justice Lurton pointed out as one of the bases for his holding (op. cit. p. 730), that the bill averred that the city council acted wholly without any authority from the state. Here, the complaint alleges that the defendants acted "arbitrarily and without legal cause" (par. 14) (R. 6). That allegation is repeated in paragraph 16 (R. 7). If the allegations of the complaint are true, the acts of the registrars are not acts of the State of Georgia, but merely the acts of "certain individuals acting unlawfully."

We also call attention to the following cases:

Dawson v. Columbia Trust Co., 197 U. S. 178;

Memphis v. Cumberland Tel. Co., 218 U. S. 624 (which approves Judge Lurton's opinion in the Louisville case, supra);

Prentis v. Atlantic Coast Line R. Co., 211 U. S. 230.

In this last cited case, a state railroad commission, granted power by the state constitution of Virginia to make and enforce rates, enacted and attempted to enforce railroad rates which were so low as to be confiscatory.

The railroads sought to enjoin the order before having appealed the order to the State Supreme Court of Appeals. The Supreme Court held that the suit should not have been commenced until the rate had been fixed by the body having the last word.

"No rate is irrevocably fixed by the State until the matter has been laid before the body having the last word" (op. cit. p. 231).

This phase of the case has nothing to do with the facet of exhaustion of administrative remedies. This simply illustrates that the State of Georgia cannot be said to have abridged or denied a person's right to vote until that person shall have had reviewed by Georgia's courts the alleged arbitrary and discriminatory action of the registrars.

Georgia's law provides for appeals which are tried in the superior court as other appeals. (Code, pocket part, 34-116) (Appendix D).

The general law as to other appeals is set out in Sections 6-101 et seq. of the Code.

> "An appeal to the superior court is a de novo investigation. It brings up the whole record from the court below, and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not; either party is entitled to be heard on the whole merits of the case."
>
> Code, Sec. 6-501.

On an appeal to the superior court, the case must be tried anew as if no trial had been had.

Hall v. First National Bank, 85 Ga. App. 498 (3).

"All appeals to the Superior Court shall be tried by a jury at the first term after the appeal has been entered" (Code Sec. 6-601).

From the judgment of the Superior Court there is the right of appeal to the Court of Appeals (Sec. 2-3708), or to the Supreme Court of Georgia, if a constitutional question is involved (Sec. 2-2704).

The statutes of Georgia specifically set out what the Board **shall** do in qualifying applicants for registration. In section 17 (a) [now Sec. 34-117 (a)], the word "shall" occurs eleven times; in section 17 (b) and 18 and 19, the word "shall" occurs eight times.

In **Shanks v. Banting Mfg. Co.**, 9 F. 2d 116, District Judge Killets of Ohio considered the Barney case, supra, and a later case which he said distinguished and narrowed it—**Home Telegraph and Telephone Co. v. Los Angeles**, 227 U. S. 278, 294, 33 S. Ct. 312, 57 L. Ed. 510.

From them, and similar cases, he deduced the rule:

> "In all cases, so far as we have been permitted to consider them, in which jurisdiction was maintained

in a federal court of first instance, without requiring diversity of citizenship, the State, acting through one of its agencies, **followed the course of its own legislation, exercising a discretion as to the interpretation and application of such legislation,** and the criterion existed that it was the state acting within its own authority which was contravening the Fourteenth Amendment. **Here this state agency acted contrary to state authority,** assuming plaintiff's contention, as to necessity of service, and it is to be presumed, as the state legislation provides for an opportunity to present the question to the state court, that, when its error is shown to it, it would be corrected. If not, the power of the federal court to enforce the Fourteenth Amendment follows . . . should the highest court in the state act to uphold an abuse of that constitutional safeguard" (op. cit. p. 118).

Here, assuming the averments of the complaint to be true, the defendants did not follow the course of Georgia's legislation. The defendants kept separate records as to applicants for registration, and used differently colored cards for white and negro applicants and voters. That was not a following of the course of the State's legislation. The State's legislation as to form and contents of the card is Section 34-108 of the Annotated Code, pocket part. The defendants designed the acts and practices complained of. **They** intentionally designed them. The defendants, not the State of Georgia, allegedly **arbitrarily** delayed handling applications for negroes, says the complaint. When certain applicants elected to take the literacy test (complaint, par. 14), the defendants allegedly did not exercise any discretion as to the interpretation and application of the statute, but **"arbitrarily and without legal cause"** prevented the applicants from demonstrating their ability to write correctly and legibly.

The complaint says that the defendants have applied different and more stringent registration standards to

negroes (Par. 17). That, if true, is their individual act, and not following the course of Georgia's legislation. That act, says the complaint (Par. 18), was not accidental. It "was designed and intended by **them** to discriminate against Negroes."

If the allegations of the complaint are true, the defendants have designed a plan of **their own**, not of the State, **intended by them** to discriminate against Negro applicants.

The United States of America certainly have **no** cause of action unless the parties allegedly aggrieved have. The "parties aggrieved" have no cause of action unless the State of Georgia has on account of their race or color denied them the right to vote or abridged their right to vote. The complaint shows affirmatively that the State of Georgia has done no such thing. If the allegations of the complaint are true the acts of the defendants were theirs individually. If the parties were "aggrieved," the grievances occurred on April 7, 1958. (Complaint, Par. 14, et seq.) They had ten days in which to appeal (Code, Sec. 34-116, Pocket Part). Under the statutes of Georgia, there was a regular term of the Superior Court of Terrell County set for the first Monday in June, 1958. Instead of pursuing the corrective remedy afforded by Georgia, they evidently appealed to the Department of Justice by which this action was filed September 4, 1958, five months after the alleged grievance.

In **Prentis v. Atlantic Coast Line et al.**, 211 U. S. at page 230, Mr. Justice Holmes used language which is apt here:

> "The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission; not only by the character of the members of that Commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal.

> It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States."

At page 231 of that same case, Justice Holmes said (for the majority of the Court): "No rate is irrevocably fixed by the State until the matter has been laid before the body having the last word."

We repeat: It isn't merely a matter of exhaustion of remedies—legislative, judicial or administrative.

The question is: Has the **State** deprived or abridged?

Question 3 of the Cross-Appeal is:

> **"Whether, even if Part IV of the Civil Rights Act of 1957 is constitutional, and even if the Complaint states a claim upon which the relief sought could be granted, should the action have been dismissed by the court in the exercise of its sound discretion."** (The court dealt with this in the opinion, R. 26-7.)

The circumstances here are: Five alleged negro citizens of Terrell County alleged that on April 8, 1958, the defendants designedly deprived them of their right to register and hence to vote. They had ten days in which to appeal to the Superior Court. The hearing on that appeal would have been a *de novo* hearing. That appeal would have been returnable to the June Term 1958 of the Superior Court. So far as the complaint discloses, no appeal was filed. There was an election for Governor (and other officers) in Georgia in November, 1958, with a primary preceding in September. Although allegedly desirous of voting, they made no effort to have the **alleged** intended, designed, arbitrary and illegal action of the defendants corrected by the legal process afforded them by Georgia law.

Instead they appealed to the Attorney General, who instituted this action, said to be the first of its kind under the 1957 Act (Government's brief below, p. 5).

The Attorney General, on September 4, 1958, instituted this action seeking in prayer 2 to have the Court order the Registrars to certify that the five negro citizens were eligible to vote, and seeking in the other prayers a sweeping, blanket injunction against the Registrars of Terrell County as to all negro citizens in the county.

"Judicial opinion cannot be controlled by legislative opinion of what are fundamental rights."

Rast v. Van Deman & Lewis, 240 U. S. at p. 366.

The inherent discretion which a Chancellor must exercise in determining whether or not to grant an injunction cannot be abrogated or restricted by the Congress.

The granting of an injunction rests in the sound discretion of the court to be exercised in accordance with well settled equitable principles and in the light of all the circumstances of the case.

Injunctions, 28 Am. Jur., Sec. 35.

Another factor to be considered is that there is no general election for Federal or State officers to be held in Georgia until 1960.

The circumstances under which even the Congress intended that the authority conferred upon the Attorney General should be used by him is conclusively demonstrated by the testimony of Attorney General Brownell during the hearings on the bill which became the Civil Rights Act of 1957.

During the hearings before the House subcommittee, he was questioned by Representative Miller (Republican of New York).

"Mr. Miller: Mr. Attorney General, on page 6 of the same bill, section 121, paragraph 4: 'Whenever any

persons have engaged or about to engage in any acts or practices,' from your experience as Attorney General during the past four years could you give me a hypothetical example of what might be 'about to engage in any act?'

"Mr. Brownell: Yes. For example, if you have a registrar of voters who arbitrarily strikes off **several thousand names of Negro voters,** shortly before the deadline for qualification of voters and gives no hearing to them or an inadequate hearing, then I would think that would be a case that would alert the Attorney General under this bill to the need for some injunctive action which would give those people **their day in court** and allow them, like any other citizen, the right of franchise.

"Mr. Miller: To be placed back on the books for the purpose **of the forthcoming** election so **they** would not lose their franchise **in that election,** which they would lose if they had to resort to a lengthy criminal proceeding.

"Mr. Brownell: That is right." (Emphasis added.)

(House Hearings of February 4, 5, 6, 7, Serial No. 1, p. 601.)

Then followed a few lines of colloquy, and the Attorney General said:

"It is a matter of concurrent jurisdiction, and **in an emergency** of the type you and I have just discussed, I think there should be nothing, either in the rules of the local board or regulations **OF THE STATE which would prevent a speedy hearing in time to do some good** . . ."

Then:

"Mr. Miller: And it would be presumed, of course, that the court would follow, and would not circumvent or ignore the State law on the subject of rules, so long as they were not arbitrary or discriminatory?

"Mr. Brownell: That is correct, but would exercise **general equity jurisdiction,** which would permit our district court to give due justice to all parties." (Emphasis supplied.)

This demonstrates that the declared purpose of the provision was to permit the Attorney General to act in an emergency where lacking such action thousands of voters would be disfranchised at a forthcoming election.

It further demonstrates that Congress did not intend that the District Courts should be deprived of the prime one of its general equity powers—its discretion to determine whether the circumstances warrant the use of "this strong arm of equity."

It further demonstrates that neither the Attorney General nor Congress intended that a District Court should either supplant or become an appeal board for States' Boards of Registrars.

When Attorney General Brownell testified before the Senate subcommittee he said about the same as to the purposes of the harsh remedy provided by the Act. (Senate hearings, pages 30-31, et seq.)

Rather prophetically, Senator Ervin stated:

"Ordinarily in North Carolina you can get an administrative remedy before you can get your pleadings drawn for the case in the Federal Court" (p. 31).

The Attorney General replied: "Then that would be much preferable."

The institution of this action was authorized despite the fact that no emergency existed, five voters were allegedly affected, no resort to the remedies afforded by the State was had, no effort was made to enforce these fives' alleged right to vote in the 1958 Georgia elections, but, with no Federal or State election in prospect until the fall of 1960, the Department of Justice asked the District Court of the

United States for the Middle District of Georgia to substitute itself for the State Board of Registrars of Terrell County.

It was urged below that the matter of the Court's exercising its discretion "is not properly raised by a motion." The Court below recognized that equitable relief might be denied in the exercise of the Court's discretion, but thought the discretion should be one informed by evidence. There are authorities to the contrary.

> "We think however that the remedy by injunction, which is a discretionary remedy even when the Court has jurisdiction to grant it, ought not to be had to control the State officer in the conduct of his office even though his conduct may appear to be wrong, until the remedy to correct him provided by the State has been exhausted. This rule is of special importance between the Federal Courts and State functionaries."
>
> Peay v. Cox, 190 F. 2d at p. 125 (C. C. A. 5).

Despite the language of Title 42 U. S. C. A. 1971 (c), and the effort of Congress to encroach upon the powers of the Judiciary, it remains a "discretionary remedy."

And the courts can exercise their discretion upon a reading of the complaint as well as after hearing evidence to support the complaint.

The Court would ask and answer: Assuming the statute is valid, assuming the complaint states a case upon which relief **could** be granted, **should** I, in the exercise of my discretion, grant it even if its allegations are true? **Should** I, in the light of the declared purpose of the bill, the fundamental principles of equity jurisprudence, and the circumstances existing?

Congress cannot expect the courts to break with historic principles of equity in the enforcement of equitable rights.

Holmberg v. Ambrecht, 327 U. S. 582.

"Discretionary refusal to exercise equitable power under the Civil Rights Act (of 1870, 1871) to interfere with state criminal prosecution is one of the devices sanctioned for preserving the proper balance between the States and the Federal government in law enforcement. 8 U. S. C. A., Sec. 42."

Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118 (h. n. 7).

"No such irreparable injury, clear and imminent" was threatened there.

Ibid, at p. 122.

"A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest (citing cases). It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative. The actuality of the plaintiff's need for a declaration of his rights is therefore of decisive importance."

Eccles v. Peoples Bank, 33 U. S. 431-2, 68 S. Ct. 644.

"A motion to dismiss a suit for declaratory judgment is addressed to the discretion of federal district court."

Brillheart v. Excess Ins. Co., 316 U. S. 491, 62 S. Ct. 1173 (h. n. 2).

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 63 S. Ct. 1070.

In the recent case of **Aetna Ins. Co. v. Busby**, 87 F. Supp. 505, 507, Judge Lynne said:

". . . defendants' motion to dismiss the bill is addressed to the discretion of the court."

The sixth question in the Cross-Appeal is: Whether the District Court, in a proceeding under the Act, has the right to direct registrars to certify to the appropriate agency that certain named persons are eligible to register to vote.

This question springs from prayer (2) of the complaint (R. 8). There the Court was asked to enjoin the defendants from "failing or refusing, on the ground that the following persons failed to meet the requirements of the literacy test provided by the law of Georgia, to certify to the appropriate county or state official or agency that the said persons are eligible to register to vote in Terrell County: . . ."

A Court could hardly do that without holding a registration hearing to determine whether the five named persons are entitled to be registered under the Constitution and laws of Georgia. A Court need not yet concern itself with whether it will be converted into an appeal board supervising the methods of every Board of Registrars in the District, for the law does not grant jurisdiction to District Courts to pass any such order.

If a court should enjoin a man from not paying over to another a certain amount of money, that is equivalent to commanding him to pay over that amount. So if a Court should enjoin the defendants from not certifying the Lowes, and Gibsons, and Breedlove, it is equivalent to a mandamus compelling their certification.

It is axiomatic that Federal District Courts have no general original jurisdiction in mandamus proceedings.

Encyclopedia of Federal Procedure, 3rd Edition, Vol. 15, Section 84.34, citing among others:

Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109;

Innes v. Hiatt, 57 F. Supp. 17.

In the latter case the Court said:

> "Moreover, treating the proceedings under the designation of 'injunction', it is in effect an attempt to obtain a mandamus against the Warden of the Penitentiary to change his records, and this Court has heretofore pointed out that where the action is not in aid of this court's jurisdiction but is an original proceeding in mandamus, the District Court has no jurisdiction. Hogan v. Hill, D. C., 9 F. Supp. 975, affirmed 3 Cir., 78 F. 2d 1017."

That court is not by itself. For many other cases of like nature, see Courts, Key Number 265, Federal Digest, and especially **Updegraff v. Talbott**, 221 F. 2d 342. That case, written by the late Judge Parker, cogently points out that district courts are without power to grant mandatory injunctions which in effect are writs of mandamus (op. cit. p. 345).

CONCLUSION.

What the Fifteenth Amendment meant in 1875, it means now.

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were

understood when made, are still within them, and those things not within them remain still excluded."

South Carolina v. United States, 199 U. S. at pages 448-9.

It indisputably appears that the Civil Rights Act of 1957 is so broad in its scope that it is thereby rendered void. It, in its entirety (42-1971 a, b, c, d, e) or even with subsection (b) ignored, is not appropriate legislation under the powers conferred by the Fifteenth Amendment.

Further, the action it authorizes to be brought is not an action "in equity" as contemplated by the Constitution.

The suit as brought must be authorized by the statute, or the United States has no right to sue. (United States v. Reese, supra.)

If the statute is so broad in its scope as to be unconstitutional, the attempt of the Department of Justice to narrow it, to amend it, and to save it by alleging "under color of office" doesn't save it.

The judgment of the District Court was right and should be affirmed.

Respectfully submitted,

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APPENDIX.

(Showing Sections of Georgia Code Referred to in This Brief.)

A. 34-117. When an applicant appeals before the board of registrars for examination, the board shall proceed as hereinafter provided.

(a) If the applicant applies for registration and seeks to qualify on the basis of literacy, the board shall submit to him a section of the Constitution of Georgia or of the United States and the applicant shall be required to read it aloud and write it in the English language. If the applicant reads the section intelligibly and writes it legibly, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected. If the applicant states that solely because of physical disability, he is unable to read or write, the section shall be read to him by any member of the board and he shall be called upon to give a reasonable interpretation thereof. The interpretation shall be in the applicant's own words, giving words the significance ordinarily attached to them by a layman of average intellect and attainments. If, in the opinion of the board, the applicant gives such a reasonable interpretation, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected.

(b) If the applicant applies for registration and seeks to qualify on the basis of his good character and his understanding of the duties and obligations of citizenship

under a republican form of government, he shall be given an examination based upon a standard list of questions as hereinafter provided.

B. 34-118. The examination which the registrars shall submit to an applicant who claims the right to register on the basis of good character and understanding of the duties and obligations of citizenship under a republican form of government, shall be based upon a standard list of questions, and the questions on this list and no others shall be submitted to such applicant. In order to ascertain whether an applicant is eligible for qualification as a voter in this classification, the registrars shall orally propound to him the 30 questions on the standardized list set forth hereinafter. If the applicant can give correct answers to 20 of the 30 questions as they are propounded to him, possesses the other necessary qualifications and is not disqualified in any other way, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected.

C. 34-119. The standard list of questions which shall be propounded to each applicant is as follows:

1. What is a republican form of government?

2. What are the names of the three branches of the United States government?

3. In what State Senatorial District do you live and what are the names of the county or counties in such district?

4. What is the name of the State Judicial Circuit in which you live and what are the names of the counties or county in such circuit?

5. What is the definition of a felony in Georgia?

6. How many Representatives are there in the Georgia House of Representatives and how does the Constitution of Georgia provide that they be apportioned among the several counties?

7. What does the Constitution of Georgia prescribe as the qualifications of Representatives in the Georgia House of Representatives?

8. How does the Constitution of the United States provide that it may be amended?

9. Who is the Chief Justice of the Supreme Court of Georgia and who is the Presiding Justice of that court?

10. Who may grant pardons and paroles in Georgia?

11. Who is the Solicitor General of the State Judicial Circuit in which you live and who is the judge of such circuit? (If such circuit has more than one judge, name them all.)

12. If the Governor of Georgia dies, who exercises the executive power, and if both the Governor and the person who succeeds him die, who exercises the executive power?

13. (a) What does the Constitution of the United States provide regarding the suspension of the privilege of the writ of habeas corpus?

(b) What does the Constitution of Georgia provide regarding the suspension of the writ of habeas corpus?

14. What are the names of the persons who occupy the following State offices in Georgia?

(1) Governor.

(2) Lieutenant Governor.

(3) Secretary of State.

(4) Attorney General.

(5) Comptroller General.

(6) State Treasurer.

(7) Commissioner of Agriculture.

(8) State School Superintendent.

(9) Commissioner of Labor.

15. How many Congressional Districts in Georgia are there and in which one do you live?

16. What is the term of office of a United States Senator?

17. What is the term of office of a State Senator?

18. What is the county site of your county?

19. How does the Constitution of Georgia provide that a county site may be changed?

20. What are the qualifications for jury service in Georgia?

21. What are the names of the persons who occupy the following offices in your county?

(1) Clerk of the Superior Court.

(2) Ordinary.

(3) Sheriff.

22. How may a new state be admitted into the Union?

23. On what day and how often is the general election held in Georgia at which members of the General Assembly of Georgia are elected?

24. What does the Constitution of the United States provide regarding the right of citizens to vote?

25. In what Federal Court District do you live?

26. What are the names of the Federal District Judges of Georgia?

27. Who are citizens of Georgia?

28. What is treason against the State of Georgia?

29. In what body does the Constitution of the United States declare that the legislative powers granted in such Constitution shall be vested?

30. How many electoral votes does Georgia have in the electoral college?

D. 34-116. All decisions of the registrars under this Chapter shall be subject to appeal. An appeal must be in writing and shall be filed with the registrars within 10 days from the date of the decision complained of. It shall be returned by the registrars to the office of the clerk of the superior court to be tried as other appeals. Pending the appeal and until final judgment in the case, the decision of the registrars shall remain of full force.